D.B. INCOME TAX APPEAL NO. 43/1999.

CIT BIKANER VS. M/S.GANPAT RAM BISHNOI

DATE OF ORDER : 08.08.2005.

HON'BLE MR. RAJESH BALIA,J.
HON'BLE MR. R.S. CHAUHAN, J.

Mr. K.K. Bissa for the appellant.
Mr. Suresh Ojha for the respondents.

This appeal under Section 260-A of the Income Tax Act, 1961 was admitted on 27.10.99, however, substantial question of law required to be considered in this appeal was not formulated at that relevant time. The substantial question of law stated to be arising for consideration in this appeal by the Revenue has been set out in Appeal as under :

> "Whether on the facts and having regard that confirmations from creditors were not filed, the appellate Tribunal was right in holding that the assessment order was not erroneous and consequently in cancelling the order under Section 263."

We have heard learned counsel for the parties and perused the material available on record.

The assessment for Assessment Year 1993-94 in the case of respondent-assessee was completed on 31.1.96 under Section 143(3).

The Commissioner of Income Tax considering the said order to be erroneous and prejudicial to the interest of Revenue invoked his jurisdiction under Section 263 of the Income Tax Act, 1961 cancelled the Assessment Order and directed the Assessing Officer to make a fresh assessment order after making inquiry into the genuineness of fresh deposits made in the capital accounts of the partners, genuineness of cash credits in the name of 26 different persons totaling Rs.4,22,115/-, as per Schedule "B" to the Audit Report, genuineness of outstanding liability amounting to Rs.14,16,348/- in the name of various persons as per Schedule "C" and also after examining whether there is any acceptance or repayment of loan or deposit of Rs.20,000/- or more otherwise than by cheque/ bank draft and then re-determine the income chargeable to tax.

The order of the C.I.T. Dated 27.3.98 was set aside by the Tribunal by its judgment under appeal dated 7.8.98.

A perusal of the order passed by the C.I.T. shows that he has not exercised his jurisdiction or finding or apprehending that the assessment was erroneous in the above aspects as such. On the contrary, he primarily concerned that no enquiry was conducted in respect of the aforesaid items and, therefore, the assessment made by the A.O. was erroneous as it has been founded without application of mind by holding proper enquiries.

The Tribunal on the other hand, has referred to in its order, details of the proceedings, which led to the final assessment order, revealing that the A.O. was alive on all these questions and he has called upon the assessee to produce relevant material in regard to areas which was stated by the CIT to be not inquired into and after the material was produced before the Income Tax Officer, further time was given and some more documents were specifically required by the assessee before assessment could be made and thereafter only, the assessment has been made after discussing the case with authorised representatives of Assessee. The record of proceedings clearly show that the A.O. has framed his assessment after due application of mind and holding enquiries into all areas, which according to the CIT have not been at all

enquired into and the A.O. has acted merely on furnishing evidence on one single date.

In this connection, it would be relevant to refer to the material which was relied by the Tribunal to set aside the order of the CIT.

The Tribunal noticed that as per the record of the proceedings; on 16.10.95, the A.O. required the assesse to produce documents or material in relation to 10 different items, which included the details of capital contributed by partners, details of purchases made in excess of Rs.20,000/- with evidence, confirmation of unsecured loans, amongst other matters, which the A.O. desired to enquire into.

The assessee has produced desired information by 15.11.95. Thereafter, the case was adjourned to 22.11.96 and 1.12.95. On 5.12.95, the A.O. studied the sundry creditors, unsecured loans and desired to furnish affidavits of unsecured loans and details of interest paid and the case was adjourned to 19.1.96. On 19.1.96, the A.O. again required the assessee to furnish the details of partners capital account and also to produce voucher for

expenses and the matter was adjourned for 23.1.96. On 23.1.96, the case was discussed and finalised. After that, assessment was completed by passing assessment order. These matters clearly indicate that the A.O. particularly made reference to the matters, which the CIT has opined were not inquired.

Thus, according to the Tribunal, the foundation to exercise power under Section 263 of the Income Tax Act, was not existing.

We are of the opinion in the aforesaid circumstances on the finding reached by the A.O., no question of law really arises for consideration in this appeal.

It is true that in a given case not holding of any enquiry, which is a relevant for assessmnt may indicate non application of mind by Assessing Officer or furnish the ground for taking action under Sections 263 by the CIT.

In this connection, reference may be made in the case of Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax reported in (2000) 243 ITR page 83, wherein

the Commissioner of Income Tax opined that the Income Tax Officer has passed the order of "nil" assessment without application of mind. The High Court accepted this part of the assertion made by the CIT in his order that the Income Tax Officer has failed to apply his mind to the case in all perspective and the order passed by him was erroneous. The High Court has also found that the Assessment Order was passed without application of mind. The High Court rightly held that the exercise of jurisdiction by the Commissioner under Section 263(1) was justified.

From the record of the proceedings, in the present case, no presumption that can be drawn is that the A.O. had not applied its mind to the various aspects of the matter. In such circumstances, without even prima facie laying foundation for holding that Assessment order is erroneous and prejudicial to interest in any matter merely on spacious ground that the A.O. was required to make an enquiry, cannot be held to be satisfied the test of existing necessary condition for invoking jurisdiction under Section 263 of the Income Tax Act.

Undoubtedly, the jurisdiction under Section 263 is wide and has meant to ensue that due revenue ought to

reach the public treasury and if it does not reach on account of some mistake of law or fact committed by the A.O, the CIT can cancel that order and require the concerned A.O. to pass a fresh order in accordance with law after holding a detailed enquiry. But when enquiry in fact has been conducted and the A.O. has reached a particular conclusion, though reference to such enquiries has not been made in the order of the assessment, but the same is apparent from the record of the proceedings, in the present case, without anything to say how and why the enquiry conducted by the A.O. was not in accordance with law, the invocation of jurisdiction by the CIT was unsustainable. As the exercise of jurisdiction by the CIT is founded on no material, it was liable to be set aside. Jurisdiction under Section 263 cannot be invoked for making short enquiries or to go into the process of Assessment again and again merely on the basis that mere enquiry ought to have been conducted to find something.

The finding of the Tribunal that the Income Tax Officer had passed Assessment Order after relevant enquiries and considering the aspects of the matter required by the CIT to be considered by him is a finding of fact and on basis of which, the jurisdiction was assumed by

the CIT being non existent must be held to be not sustainable.

Consequently, the appeal fails and is hereby dismissed.

(R.S. CHAUHAN)J. **(RAJESH BALIA)J.**

Anil/